IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 321 of 1993

For Approval and Signature:

Hon'ble MR.JUSTICE M.H.KADRI
and
Hon'ble MR.JUSTICE A.L.DAVE

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

HIMATBHAI P TADVI

Versus

STATE OF GUJARAT

Appearance:

MRS SHILPA J UNWALLA for Petitioners

MR ND GOHIL for Respondent

CORAM : MR.JUSTICE M.H.KADRI
and
MR.JUSTICE A.L.DAVE

Date of decision: 14/09/2000

ORAL JUDGEMENT : (Per : M.H. Kadri, J.)

1. The appellants, by filing this appeal under section-374(2) of the Code of Criminal Procedure, have challenged the Judgement and Order dated February 18, 1993 passed by the learned Additional Sessions Judge, Vadodara in Sessions Case No. 121 of 1992 by which both the appellants came to the convicted under section-302 read with section-34 of the I.P. Code and were sentenced to undergo imprisonment for life and fine of Rs.2000/= in default S.I. for 6 months.

2. The prosecution case be summarised as under :

The deceased, Ratnabhai, was residing in Mahudi Bhagol Tekra Falia, Town-Dabhoi. The deceased was selling milk and was keeping cattles for his livelihood. On September 24, 1990 at about 4:30 p.m. the appellant no.1, who had consumed liquor, had come to the house of the complainant, Vinuben Haribhai and had lied down on the cot which was kept in front of her house. Appellant no.1 was abusing in filthier language and therefore, the deceased scolded him and told him to go away from the house of the complainant. At about 5:30 p.m. on the same day, the deceased, Ratnabhai, was going towards his cattles to milch them, at that time, appellant no.1 in company of appellant no.2 came near the deceased. The appellant no.1 caught hold of the deceased whereas appellant no.2, who was armed with stick, gave one blow on the back side of the head of the deceased and as a result, the deceased fell down and both the appellants ran away. On hearing shouts, the complainant and other persons residing in the nearby locality rushed to the place where the deceased was lying. The deceased was removed to the Government Hospital, Dabhoi in an auto-rickshaw. The Doctor on duty of the hospital examined the deceased and declared him dead. An offence came to be registered at the Dabhoi Police Station against the appellants under section-302 read with section-34 of I.P.C. The investigation of the offence was carried out by Police Inspector, Mansukhlal R Karanjia. The investigating officer recorded the complaint of Vinuben Haribhai. Thereafter, he held the inquest of dead body of the deceased, Ratnabhai, on September 25, 1990 and the dead body of the deceased was sent for post mortem. Doctor, S.B. Shrimali, performed the post mortem of the dead body of the deceased on September 26, 1990. Doctor, Shrimali, had examined appellant no.1 at about 10 :00 a.m and blood examination of the appellant no.1 revealed that he had not consumed alcohol. Police Inspector, Karanjia, recorded the statement of the witnesses and drew Panchnama of the scene of offence. On September 26, 1990, appellant no.1

was arrested under a panchnama and was sent for medical examination. On September 27, 1990, appellant no.2 came to be arrested and when he was in custody, he had shown his willingness to produce the stick which was used in the commission of the crime. In presence of two Panchas, the muddamal stick was discovered and discovery panchnama was prepared. After completing the investigation, Police Inspector, Karanjia, submitted chargesheet against the appellants in the Court of the learned J.M.F.C, Dabhoi. As the offence under section-302 of the I.P.Code was exclusively triable by the Court of Sessions, the learned Judicial Magistrate (F.C) committed the case to the Sessions Court at Vadodara which came to be numbered Sessions Case No. 121 of 1992.

3. Charge, Exh.1, was framed against the appellants for the offences punishable under section-302 read with section-34 of the I.P.Code. The charge was read over to the appellants wherein they claimed to be tried. The prosecution, to prove the case against the appellants, examined PW1, Vinuben Haribhai-Exh.9, PW2, Amarben Jaksibhai-Exh.10, PW3, Khubanbhai Alibhai-Exh.11, PW4, Kishorbhai Bapubhai-Exh.12, PW5, Bhikhabhai Koyajibhai-Exh.14, PW6, Govindbhai Mansukhbhai-Exh.15, PW7, Shailesh Bhikhabhai-Exh.16, PW8, Habib Mahmad Makarani-Exh. 17, PW9, Yusufbhai Yakubbhai-Exh.18, PW10, Abdulbhai Ishmailbhai-Exh.21, PW11, Mahmad Saiyed Ibrahimbhai-Exh.22, PW12, Sumanlal Bholanath Shrimali-Exh.23, PW13, Shantilal Ramjibhai-Exh.26 and PW14, Mansukhlal Purshottambhai, Exh.2. The prosecution produced documentary evidence such as inquest panchnama, panchnama of the scene of offence, panchnama of the clothes of the deceased, arrest panchnamas of the appellants, Post Mortem notes, medical certificate of appellant no.1, complaint, discovery panchnama of the muddamal stick, etc., to prove the case against the appellants. After the prosecution case was over, the appellants were questioned generally and their statements came to be recorded under section-313 of the Criminal Procedure Code. The case of the appellants was of total denial.

4. The learned Additional Sessions Judge after hearing the arguments advanced by the learned Additional Public Prosecutor, and the learned Advocate for the defence, came to the conclusion that prosecution had proved the charges levelled against the appellant. The learned Sessions Judge further concluded that the appellants shared common intention, to cause death of the

deceased and in furtherance of the common intention, appellant no.1 had caught hold of the deceased whereas the appellant no.2, who was armed with stick, had caused a fatal blow on the back side of the head of the deceased, as a result of which, the deceased has succumbed to the injuries. The learned Sessions Judge further concluded that the medical evidence of Doctor, Shrimali, also supported the prosecution's case that the fatal blow given by appellant no.2 of the stick on a vital part of the deceased was sufficient in the ordinary course of nature to cause the death. On the basis of the above referred two conclusions, the learned Additional Sessions Judge convicted both the appellants under section-302 read with section-34 of the I.P.Code and sentenced them to suffer imprisonment for life and fine of Rs.2000/= each and in default, S.I. for 6 months. However, the appellants were acquitted for the offence punishable under section-135 of the Bombay Police Act.

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5. The above order of conviction and sentence imposed by the learned Additional Sessions Judge, Vadodara has been challenged by the appellants in this appeal.

6. The learned counsel for the appellant, Mrs. Unawala, and learned APP, Mr. Gohil, have taken us to the entire record and proceedings of the Sessions Case No.121 of 1992. The learned counsel for the appellants has not disputed the occurrence of the incident, but has submitted that prior to that incident, there was a heated exchange of words between the deceased and the appellants. A scuffle had also taken place and because of grave and sudden provocation, stick blow was inflicted on the head of the deceased. The counsel for appellants submitted that the appellants can be held liable for the offence under section-304, Part-II and could not have been convicted for the offence under section-302 of the I.P. Code.

7. The learned APP, Mr. N.D. Gohil, on the other hand, submitted that the evidence of Doctor, Shrimali, had established that appellant no.2 had selected vital part i.e. head for inflicting blow on the deceased, Ratnabhai and the blow inflicted with stick was so serious that it was sufficient in the ordinary course of nature to cause the death. The learned APP has, therefore, submitted that looking to the circumstances and the manner in which the fatal blow was inflicted on the head of the deceased, the present case would fall under section-302 of the I.P.Code and therefore, the appeal be dismissed and conviction and sentence imposed

by the learned Additional Sessions Judge, Vadodara, be maintained.

8. The complainant, PW1, Vinuben Haribhai, though had filed the complaint, had not witnessed the occurrence of the incident. Two eye witnesses viz. PW3, Khubanbhai Alibhai and PW6, Govindbhai Mansukhbha have admitted in their evidence that before the occurrence of the incident, there was a verbal exchange of words and a scuffle had taken place. The evidence of both the eye witnesses indicates that before inflicting of stick blows, a scuffle had taken place between the deceased and the appellants, as a result of which, appellant no.1 had caught hold of the deceased whereas appellant no.2 had given a stick blow on the back side of the head of the deceased. The evidence of the prosecution witness, in our view, did not establish that the appellants had common intention to cause death of the deceased. The incident had taken place all of a sudden, as a result of heated exchange of words between the appellants and the deceased and out of a sudden grave and provocation, the appellant no.2 had given the blow with stick on the head of the deceased. Even, after inflicting the blow with stick as the deceased had fallen down, the appellants had run away. If the appellants wanted to cause the death of the deceased, successive blows with stick would have been inflicted on the head of the deceased. The circumstances enumerated above, emerging from the evidence of prosecution witnesses, clearly indicate that the appellants had no intention to kill the deceased, and after giving one blow, they had run away. If their intention was to kill the deceased, successive blows with stick could have been inflicted on him. As per the prosecution case, appellant no.1 had caught hold of the deceased and therefore, the deceased had become helpless and therefore, there were ample opportunities for appellant no.2 to inflict successive blow with stick on the head of the deceased. The incident had taken place due to heated exchange of words between the appellants and the deceased, and also as a result of scuffle between them. The appellants had launched attack on the deceased so as to teach him a lesson and not to cause his death.

9. Section-34 of the I.P.Code lays down a principle of joint liability that doing of a criminal act, the essence of that liability is to be found in existence of a common intention animating the accused leading to doing of a criminal act in furtherance of such an intention. The distinct feature of section-34 is the extent of participation in action. The common intention implies acting in concert, extent of a concert and plan which is

to be proved either from conduct or from circumstances or from any incriminating facts. It requires prearranged plan and it presupposes prior concert. Therefore, there must be a prior meeting of mind. As admitted by PW3, Govindbhai Mansukhbhai, both the appellants had come from different directions and therefore, it was established that they had not come together where the deceased was standing. Therefore, it can be said that they had not come on the scene of offence together with a pre-concert to launch murderous assault on the deceased. The circumstances, emerging from the evidence of the prosecution witnesses, in our opinion, do not establish that there was pre-concert and meeting of minds between the appellants which has resulted into common intention to cause the death of the deceased.

10. In our view, the offence committed by the appellants would fall under Exception No.4 of section-304 of the I.P.Code.

11. As a result of the foregoing discussion, we set aside the conviction and sentence imposed by the learned Additional Sessions Judge, Vadodara by Judgement and Order 18/2/1993 rendered in Sessions Case No.121 of 1992 and instead, we hold that both the appellants shall be convicted under section-304, Part-II read with section-34 of I.P.Code and each of the appellant shall be sentenced to undergo imprisonment of 7 years and pay fine of Rs.1000/= in default, S.I. for 3 months. We are informed by the learned counsel for the appellants that the appellants are in custody since their arrest on September 26, 1990 and that they have remained in custody for more than 7 years. Therefore, we direct that the appellants be released forthwith from the custody if their presence is not required in connection with any other case. Mudammal be disposed of as per the directions of the Sessions Court. The appeal is, accordingly, allowed to the extent indicated above.

(M.H. Kadri, J.)

(A.L. Dave, J.)

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